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No. 83-997

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

TRANS WORLD AIRLINES, INC.,
Petitioner.

v.

HAROLD H. THURSTON, CHRISTOPHER J. CLARK, C. A. PARKHILL, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AND AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Respondents.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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The Chamber of Commerce of the United States hereby moves for leave to file the attached brief *amicus curiae* in support of the petition for certiorari in this case pursuant to Supreme Court Rule 36.1. This motion is necessitated by the refusal of the individual respondents to consent to the filing of the brief. The petitioner and the respondents, Equal Employment Opportunity Commission and Air Line Pilots Association, have consented to the filing.[1]

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[1] Copies of the consent letters are being filed simultaneously with the attached brief. Counsel for the Air Line Pilots Association has orally consented to the filing.

This case arose out of the Federal Aviation Administration's requirement that commercial airline pilots retire at age 60. 14 C.F.R. § 121.383(c). The issues presented by this case are fundamental to the application of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 (1982). Those issues are whether specific intent is necessary to establish a "willful" violation of the ADEA; whether a labor union which has been found to have violated the ADEA is immune from liability for back pay; and what age-related accommodations an employer must make for employees when it makes non-age-related accommodations.

Receiving guidance on complying with the ADEA is of crucial importance to the business community. It is well established that the percentage of the American workforce within the ADEA's protected class (ages 40-70) is constantly growing.[2] It is thus likely that the number of cases filed under ADEA will grow as well.

As the largest federation of business organizations and individuals in the United States and the principal spokesman for the American business community, the Chamber of Commerce of the United States ("Chamber") is well-suited to present the broad interest of business in this case. The Chamber's current membership exceeds 200,000, including over 195,000 corporations, partnerships and proprietorships, as well as over 3,900 trade associations, and local and state chambers. As one of its principal functions, the Chamber regularly presents its views before this Court, as well as the lower federal courts.[3]

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[2] *See* Monison, "The Aging of the U.S. Population; Human Resource Implications", BNA Daily Labor Reporter No. 112, p. F-1 (June 9, 1983).

[3] *See, e.g., Bowen* v. *U.S. Postal Service*, —— U.S. ——, 74 L. Ed. 2d 402 (1983); *First National Maintenance Corp.* v. *NLRB*, 452 U.S. 666 (1981); *Amoco Production Co.* v. *NLRB*, 613 F.2d 107 (5th Cir. 1980).

The Chamber believes it is important for this Court to recognize the business community's need for guidance on the issues noted above. It is for this reason that the Chamber respectfully requests leave to file the attached brief.

Respectfully submitted,

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STATEMENT OF INTEREST

The Chamber of Commerce of the United States ("Chamber") respectfully refers this Court to its Motion for Leave to File Brief Amicus Curiae for a statement of the Chamber's interest in this proceeding.

I. CONFLICTING OPINIONS OF WHAT CONSTITUTES A WILLFUL VIOLATION OF THE ADEA FAIL TO PROVIDE A CLEAR UNDERSTANDING OF THE SCOPE OF THE ADEA.

A. A Single Standard For Determining A Willful Violation Of The ADEA Will Ensure Consistent Results For All Employers Subject To The ADEA.

Willful violations of the Age Discrimination in Employment Act ("ADEA") can provide a basis for plaintiffs alleging age discrimination under the ADEA to obtain double damages from their employers. 29 U.S.C. § 626(b) (1982). The issue of what constitutes a willful violation of the ADEA is thus of vital concern to virtually all employers in the United States, especially those who may be forced to lay off employees in times of economic hardship. Economic decisions to upgrade technology or to discontinue outdated methods of manufacturing also may adversely affect older workers with more traditional training. Compliance standards under the ADEA are particularly important to multi-jurisdictional employers although they remain troublesome to owners of small businesses as well.

Multi-jurisdictional employers who unwittingly violate the ADEA may find their actions subject to at least four different standards currently used by the Courts of Appeals to determine willful violations of the ADEA. Small business owners who think of willful actions in terms of dictionary definitions are equally confused by the complex, multiple legal tests presently used to determine willful violations of the ADEA.

The Chamber is concerned about this disagreement in the circuits and the confusion it causes in the business world. Guidance from this Court is imperative in order to provide both employers and the lower courts with a fixed understanding of what standards should control

claims of willful violations of the ADEA. Action by this Court to establish a single standard for determining willfulness would allow all courts to follow a uniform guideline when deciding claims for double damages. Beside giving employers an understanding currently absent from the law, uniformity would ensure that problems regarding the definition of willfulness would not recur in the courts each time an employee files a claim for double damages.

B. The Standard Of Willfulness Adopted By The Majority Below Is Unfair And Conflicts With At Least Three Other Courts of Appeals.

Section 7(b) of the ADEA, a provision unusual among discrimination laws, authorizes the recovery of liquidated damages "*only* in cases of *willful* violations" of the Act. (29 U.S.C. § 626(b)) (emphasis added). Liquidated damages are clearly defined as an amount equal to the lost wages resulting from the violation—in other words, double damages. 29 U.S.C. § 216(b) (incorporated by reference in 29 U.S.C. § 626(b)). The definition of "willful", however, is less than clear. Congress did not define the term and the legislative history sheds no light on what was intended. The absence of congressional guidance coupled with open disagreement among the federal courts have wreaked havoc in the circuits.

At least four different standards for determining a willful violation have emerged from the courts of appeals. The lower courts most strongly differ on whether specific intent to violate the ADEA is required before liquidated damages may be imposed.

According to the standard adopted by the majority below, an employer may be liable for double damages even though he did not know his actions were illegal. Thus, in the Second Circuit "plaintiffs need not prove a specific intent to violate the ADEA; it is sufficient to establish that the employer either knew or showed reckless disregard for the matter of whether its conduct was pro-

hibited by the ADEA." (A-33). The Chamber respectfully submits that this standard is unfair, and conflicts with at least three other courts of appeals.

By deciding that proof of specific intent to violate the ADEA is not necessary to show "willfulness", the majority below expressly contradicts the principle established by the First Circuit in *Loeb* v. *Textron, Inc.*, 600 F.2d 1003 (1979). In that case, the First Circuit defines a violation of the ADEA as willful if "done voluntarily and intentionally and with the specific intent to do something the law forbids; that is to say, with bad purpose either to disobey or disregard the law. *Loeb*, 600 F.2d at 1020 n.27, *quoting* E. Devitt & C. Blackmar, *Federal Jury Practice and Instructions* § 14.06, at 384 (3d ed. 1977). The majority below, on the other hand, does not look at the purpose of an employer's action to determine whether it was willful.

Instead, the majority leaps to the specious conclusion that "'an employer's action, if taken *because* of an impermissible factor such as age, cannot be the result of negligence, mistake, or other innocent reason.'" (A-34) (emphasis in the original). Originally articulated by the Third Circuit in *Wehr* v. *Burroughs Corporation*, 619 F.2d 276 (3d Cir. 1980), this lower standard for determining willfulness allows a recovery of double damages if an employee can prove either that an employer's action was "voluntary and not accidental, mistaken, or inadvertent" or "precipitated in reckless disregard of the consequences. *Wehr*, 619 F.2d at 283. This test ignores the plain meaning of "willful" and defeats congressional intent to establish a two-tiered level of liability under the ADEA.

The fact that Congress provided for special remedies in the case of a willful violation implies that employees can recover for accidental and unintentional violations as well as for deliberate violations of the ADEA. The difference in recovery would be between liquidated damages

for willful violations and actual damages for non-willful violations. Yet, under the standard applied by the majority below, there can be no unintentional or innocent reason for an employer's action if taken because of age. Such a finding necessarily follows in every ADEA disparate treatment case. By failing to distinguish willful from non-willful conduct, the Second Circuit ignores congressional intent.

In *Syvock* v. *Milwaukee Boiler Manufacturing Company*, 665 F.2d 149, 155 (1981), the Seventh Circuit combines portions of the First Circuit's specific intent test ("[T]he standard of willfulness . . . should focus on the defendant's state of mind at the time the alleged discriminatory act occurred") with an entirely new formula for determining a willful violation of the ADEA. Thus, the *Syvock* court finds willfulness "only if there is some showing as to . . . knowledge of . . . illegality," and holds an employer liable for double damages if his actions are "knowing and voluntary and . . . he knew or reasonably should have known that those actions violated the ADEA." *Syvock*, 665 F.2d at 155-156. This standard defers to the statute's two-tiered level of liability and, thereby, avoids automatic imposition of double damages under the ADEA.

The Ninth Circuit also is selective in defining a willful violation of the ADEA. Adding to the uncertainty surrounding the meaning of willfulness, the court in *Kelly* v. *American Standard, Inc.*, 640 F.2d 974 (1981) adopts the "knowing and voluntary" standard established in *Wehr*, but expressly rejects the "reckless disregard" portion of the Third Circuit's definition. ("We decline to extend the punitive provision of double recovery beyond knowing violations." *Kelly*, 640 F.2d at 980 n.7).

C. A Single Standard Would Eliminate This Erratic Approach To Defining Willfulness And Avoid Confusing Litigation Over Claims For Double Damages.

The conflict in the circuits outlined above demonstrates an erratic approach to defining a willful violation of the

ADEA that utterly fails to provide employers and courts with a workable degree of guidance. The test adopted by the majority below does not adequately distinguish willful from non-willful violations of the ADEA and imposes automatic double damages even on employers who in good faith believe they are complying with the Act.

The Chamber urges this Court to put an end to this continuing conflict by establishing a single standard for determining willfulness that adequately protects well-meaning and conscientious employers from arbitrary imposition of double damages. The Chamber believes that employers will have fair and adequate protection from claims of willful violations were this Court to adopt a specific intent standard similar to the one established in the First and Seventh Circuits. Such a standard would avoid multiplicity of litigation over the question of whether an employer's actions were willful. A single standard would respond to the business community's need for guidance and reduce the frequency of litigation over this issue.

II. THIS COURT SHOULD RESOLVE THE CRITICAL QUESTION OF WHETHER UNIONS THAT HAVE VIOLATED THE ADEA CAN BE HELD LIABLE FOR BACK PAY.

A. Rapid Resolution Of This Significant ADEA Issue Will Avoid Unnecessarily Burdening Employers, Unions And The Lower Courts.

The initial opinion of the U.S. Court of Appeals for the Second Circuit held that the plaintiffs in this action could recover back pay from the union (Air Line Pilots Association), as well as from the employer. In this regard, the court originally held:

> [Plaintiffs] are entitled to recover back pay, an equitable remedy, against the union. *Equal Employment Opportunity Commission v. Air Line Pilots Association, Int'l*, 489 F. Supp. 1003, 1008-10 (D. Minn. 1980) *rev'd on other grounds*, 661 F.2d 90 (8th Cir. 1981). The union owes a duty to all its members, including its over-60 members, not to discriminate against them. See, *Steele v. Louisville & Nashville Railroad*, 323 U.S. 192 (1944). One of the purposes of a back pay award is to spur unions, as well as employers, to evaluate employment practices and eliminate unlawful discrimination. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417-18 (1975).

A-34-35.[4]

Although petitions for rehearing were denied, the Second Circuit subsequently deleted those portions of its opinion where it imposed back pay liability on the union. (A-38-39). The Second Circuit provided absolutely no rationale for its action. Thus lower courts, as well as parties subject to the ADEA receive no guidance from the Second Circuit's opinion on whether unions must share monetary liability with employers.

It is for this reason that the Chamber strongly urges this Court to grant the instant petition. The question of union liability for back pay is one that will be repeatedly litigated unless this Court steps in to quickly resolve the issue. It is a straight-forward question of law suitable for review by this Court. The only other courts that have addressed the issue have reached differing results. *Compare Equal Employment Opportunity Commission* v. *Air Line Pilots Assocation*, 489 F. Supp. 1003, 1009 (D. Minn. 1980), *rev'd on other grounds*, 661 F.2d 90 (8th Cir. 1981) (holding that unions as well as employers are

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[4] See A-20-21 and A-31-33 for a discussion of what the Second Circuit viewed as the union's clear culpability here. For example, the majority below specifically held that the union sought "to use the ADEA to cut off the rights of the older flight engineers." (A-20). The court also said that the union "actively campaigned to persuade TWA to retain its age-60 retirement policy for all flight deck positions, opposed TWA's unilateral action to attempt partial compliance with the ADEA and induced TWA to impose further discriminatory restrictions on captains seeking to downbid to flight engineer status . . ." (A-32-33).

liable under the ADEA for back pay) *with Neuman* v. *Northwest Airlines*, 38 FEP 1488, 1491 (N.D. Ill. 1982). We believe this portends continuing conflict in the lower courts. Quick resolution will, therefore, avoid needless litigation expenses on the part of all parties, as well as reduce litigation burdens on the lower courts.[5]

B. Congressional Intent To Subject Unions To The ADEA Will Be Emasculated If Unions Do Not Share In The Monetary Liability.

It is clear that the ADEA applies equally to employers and unions. Section 4(c) of the statute, 29 U.S.C. § 623, makes it illegal for a union to take any action which adversely affects an employee because of his or her age. It begs credulity to assume that Congress did not intend this provision to have any "teeth". Yet that is apparently the assumption made by the Second Circuit.

Statements of Congressmen during consideration of the 1978 amendments indicate strong concern that unions bear their part of the burden of compliance with the ADEA. For example, Congressman Findley stated:

> The AFL-CIO wants union leadership to keep mandatory retirement as an issue for negotiation during collective bargaining. Union leaders argue that because they represent a majority of the workers, mandatory retirement would therefore be a majority decision. But a majority should never be permitted to impose injustice on even a small minority. Unions cannot bargain away the rights of blacks or women —why older citizens?

123 Cong. Rec. H 9348 (daily ed. Sept. 13, 1977).

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[5] As we noted in our motion for leave to file this brief, ADEA litigation is likely to be one of the "growth" areas of employment related litigation. Motion of the Chamber of Commerce for Leave to File Brief Amicus Curiae, p. 2.

And, Congressman Hillis expressed agreement with an article he inserted in the hearing record from the newsletter of the American Association of Retired Persons which states in pertinent part:

> Myth: Unions should have the right to use a mandatory retirement age as a "bargaining chip" in collective bargaining with management.
>
> Reality: Unions are prohibited from discrimination on the basis of race, religion or sex in collective bargaining. Why should they be allowed to practice age discrimination by bargaining away a person's opportunity to earn a livelihood merely because of age? In recent months several unions—including the United Steelworkers of America—have made important strides toward flexible retirement policies for their members. We hope that their colleagues in organized labor will see the wisdom of this approach.

123 Cong. Rec. H 9970 (daily ed. Sept. 23, 1977).

As we previously stated, it is incomprehensible that Congress would express this type of concern over union compliance with the ADEA, but not intend union liability for losses caused by its noncompliance. *Cf. EEOC* v. *ALPA*, 489 F. Supp. at 1009. As recently as last term, this Court recognized that if unions are not made to share in the monetary liability resulting from their illegal acts they will have little motivation to comply with their statutory responsibilities. *Bowen* v. *U.S. Postal Service*, —— U.S. ——, 74 L. Ed. 2d at 416. In *Bowen*, a fair representation case, this Court stated:

> In the absence of damages apportionment where the default of both parties contributed to the employee's injury, incentives to comply with the grievance procedure will be diminished.[6]

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[6] *Bowen* was a refinement of this Court's holding in *Vaca* v. *Sipes*, 386 U.S. 171, 197 (1967) that the "governing principle . . . is to apportion liability between the employer and the union according to the damage caused by the fault of each."

Back pay awards against unions have also been consistently imposed under the National Labor Relations Act ("NLRA"), 29 U.S.C. § 141 (1972). For example, unions which violate § 8(b)(2) of the NLRA by causing an employer to discriminate against employees by encouraging or discouraging union membership have been held by the National Labor Relations Board to be entirely liable for the back pay when it was necessary to do so in order to make the injured employees whole. (29 U.S.C. § 158(b)(2)). In *Radio Officers' Union* v. *NLRB*, 347 U.S. 17, 54-55 (1953), this Court emphatically rejected the argument that it would not effectuate NLRA policies to require the union "to reimburse back pay if the employer is not made to share this burden. . . ."

Imposition of monetary liability on the unions under the ADEA is also consistent with the practice under what can be viewed as its "sister statute", Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1981). Courts uniformly have held under Title VII that unions must share monetary liability with employers.[7] The same result should obtain under the ADEA.

For these reasons, the Chamber believes that imposition of back pay liability is consistent with the ADEA, other labor statutes, and our national labor policy. Moreover, there is no inequity in imposing monetary liability on a party found to be directly responsible for a statutory violation where (1) the statute expressly imposes a duty to comply, and where (2) the statute provides that the court may "grant such legal or equitable relief as may be

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[7] See, *e.g.*, *Sears* v. *Atkinson, Topeka, and Santa Fe Railway*, 645 F.2d 1365, 1374-77 (10th Cir. 1981), *cert. denied sub nom. UTU* v. *Sears*, 456 U.S. 964 (1982); *Donnell* v. *General Motors Corp.*, 576 F.2d 1292, 1300 (8th Cir. 1978); *Allen* v. *Amalgamated Transit Union, Local 788*, 554 F.2d 876, 881 (8th Cir.), *cert. denied*, 434 U.S. 891 (1977); *Rogers* v. *International Paper Co.*, 526 F.2d 722, 723 (8th Cir. 1975). See also, Note, *Union Liability for Employer Discrimination*, 93 Harv. L. Rev. 702, 706 (1980).

appropriate to effectuate the purposes of this Act. . . ." 29 U.S.C. § 626(b). Accordingly, this Court should grant the instant petition.

III. THIS COURT SHOULD RESOLVE THE QUESTION OF AN EMPLOYER'S OBLIGATION TO ACCOMMODATE EMPLOYEES FOR AGE-RELATED REASONS WHEN NON-AGE RELATED ACCOMMODATIONS ARE PROVIDED ON A NON-DISCRIMINATORY BASIS.

A majority of the court below reversed the District Court's dismissal of the case and held that Trans World Airlines (TWA) had violated the ADEA by requiring that pilots approaching age 60 bid for positions as flight engineers prior to their 60th birthdays, and retire if no position was available. The Second Circuit's holding is based on the fact that TWA routinely accommodated pilots downgrading for reasons other than having reached the Federal Aviation Administration's ("FAA") mandatory retirement age.

The Chamber is greatly concerned about the Second Circuit's holding and its failure to define the extent of an employer's obligation to make non-age-related accommodations. This concern is heightened by the facts of this case which demonstrate that TWA's requirement was instituted as a response to an FAA regulation, that downgrading for reasons other than reaching age 60 was provided without regard to age, and that the vast majority of the pilots attempting to downgrade at age 60 were accommodated. The Chamber believes that the District Court's holding is far more rational under the circumstances. Judge Duffy held:

> From these undisputed facts these plaintiffs and claimants cannot establish a *prima facie* case of discrimination solely because no job vacancy existed at the time they applied and were eligible for the job. TWA was legally obligated to remove these pilots at age 60 under the FAA regulations. TWA was

> not obligated, however, to offer these ex-pilots jobs which did not exist. To the extent jobs existed, TWA was justified in relying upon a seniority bidding system. (Citation omitted)

(A-57)

The displeasure of the majority below with Judge Duffy's holding appears to stem from its dislike of the FAA's Age 60 Rule. This is obvious from the court's observation that the FAA does not apply the Age 60 Rule to its own pilots. (A-18). However, the net result of the appellate court's ruling is to compare two dissimilar situations, pilots downgrading for conditions such as medical problems and those downgrading because they are reaching age 60.

As Judge Van Graafeiland points out in dissent, "this is like comparing apples with oranges." (A-36) A truer comparison for purposes of establishing a case of disparate treatment would be one between two employees attempting to downgrade for medical reasons, one of whom was in the protected class, and one of whom was not. But no such claim of disparate treatment has been made here.

The Chamber believes that the holding of the Second Circuit may have wide-ranging ramifications if comparisons similar to those made by the Second Circuit are made in other factual settings. Accordingly, we urge this Court to grant the instant petition.

CONCLUSION

The Chamber of Commerce respectfully urges this Court to grant the petition for certiorari of Trans World Airlines.

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